No. 77973-2
Court of Appeals No. 56056-5-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF:

COREY BIETO, JR.,

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Corey Beito, requests this Court grant his motion for discretionary review of the order dismissing his Personal Restraint Petition(PRP).

B. RULING BELOW

Mr. Beito filed a PRP alleging the aggravated exceptional sentence imposed in his case violated his Fifth Amendment right to be free of double jeopardy, his Sixth Amendment right to a jury trial, and his Fourteenth Amendment due process right to proof beyond a reasonable doubt of the elements of his offense.

The Acting Chief Judge of the Court of Appeals, Division One entered an order dismissing Mr. Beito's PRP on October 19, 2005. The order concluded the Mr. Beito's PRP failed to make a showing of constitutional error, and was controlled by the Court of Appeals's decisions in State v. Hagar, 126 Wn.App. 320, 105 P.3d 65, review granted, 2005 Lexis 710 (2005) and State v. Maestas, 124 Wn.App. 352, 101 P.3d 426 (2004), reversed 154 Wn.2d 1033 (2005).

C. ISSUES PRESENTED

1. Where in a criminal trial a jury returns of verdict of guilty on an offense, but the court, based on a judicial determination of

additional facts, enters a judgment for a greater offense, does the judgment constitute a judgment notwithstanding the verdict in violation of the Fifth Amendment's Double Jeopardy Clause?[1]

2. The federal and state constitutions require a jury finding, based on proof beyond a reasonable doubt, of any factual determination used to increase a sentence beyond the standard range, or a knowing and voluntary waiver of these rights. Does the exceptional sentence violate Mr. Boysen's right to a jury trial and due process of law?

3. Where following a guilty plea to an offense, the trial court enters a judgment of greater or aggravated version of the offense in violation of the Fifth, Sixth and Fourteenth Amendments, is the defendant's only remedy to withdraw his plea?[2]

4. Does RAP 16.11(d) permit the chief judge of the court of appeals to dismiss PRP on the merits, where the court does not and cannot determine the petition is frivolous.

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[1] This Court recently granted review of this question in State v. Jones, 76900-1.

[2] This Court has granted review of this question in State v. Hagar, 77138-3, argument in that case is set for November 15, 2005.

5. Where in filing a nonfrivolous PRP a petitioner requests appointment of counsel pursuant to RCW 10.73.150, is the court required to appoint counsel?

D. STATEMENT OF CASE

Corey Beito was convicted on his guilty plead of one count of first degree murder and received and exceptional sentence of 504 months as opposed to a standard range sentence of 281 to 374 months. Mr. Beito has been confined since his arrest on this charge in 1998.

Mr. Beito appealed his exceptional sentence and the Court of Appeals reversed the sentence and remanded for resentencing. 46308-0-I.

On remand the trial court again imposed a 504 month exceptional sentence.

Mr. Beito again appealed his sentence and the court again reversed the sentence and remanded for resentencing. 49528-3-I.

On remand the trial court again imposed a 504 month exceptional sentence.

Mr. Beito again appealed his sentence. 51673-6-I. The Court of Appeals affirmed. The Supreme Court denied Mr. Beito's

petition for review on September 8, 2004. The mandate has not yet issued in that case.

At no point in the course of theses direct appeals, did the State ever suggest much less argue, that if Mr. Beito sought to challenge the sentence imposed his sole remedy was to withdraw his appeal.

Mr. Beito subsequently filed the present PRP. Mr. Beito made clear in his PRP that he was not challenging the voluntariness of his plea, nor asserting the State had somehow breach the plea agreement. Instead, Mr. Beito contended only that in light of the decision in Blakely v. Washington, __ U.S. __ 124 S.Ct. 2531, 2538, 159 L.Ed.2d 403 (2004) because he had not waived his right to a jury finding beyond a reasonable doubt of the aggravating factors ultimately relied upon by the trial court, he was entitled to be resentenced to a standard range sentence.

In response, the State for the first time has asserted that the remedy for any challenge to the aggravated exceptional sentence imposed is limited to Mr. Beito's withdrawal of the plea agreement. The State has offered no explanation as to why this limitation of remedies exists now, when it apparently did not apply to Mr. Beito's previous successful challenges to his sentence.

The Acting Chief Judge of dismissed the petition concluding the result was controlled by one decision of the Court of Appeals which this court has reversed, Ruling at 2 citing Maestas, and a decision of the Court of Apeals in which this Court has granted review. Ruling at 2 citing Hagar.

E. ARGUMENT

1. BECAUSE THE DECISION IN HAGAR IS INCORRECT AND, IN ANY EVENT, HAS NO APPLICATION IN THIS CASE THE COURT SHOULD GRANT DISCRETIONARY REVIEW IN THIS MATTER

a. *Hagar* is a plainly incorrect application of the decisions of this Court and the United States Supreme Court. The Sixth and Fourteenth Amendments require a jury find beyond a reasonable doubt aggravating facts used to elevate a sentence beyond that permitted by the jury's verdict or the defendat's constitutionally sufficeitn waiver. otherwise-available statutory maximum. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); Blakely, 125 S.Ct at 2536-38; State v. Hughes, 154 Wn.2d 118, 132, 110 P.3d 192 (2005). Further, the statutory maximum is "not the maximum sentence a judge may impose after finding additional facts, but the maximum he may

impose without any additional findings." Hughes, 154 Wn.2d at 132 (citing Blakely, 125 S.Ct. at 2537).

As in Blakely itself, Mr. Beito pleaded guilty and neither on appeal nor in the present PRP has he challenged the validity of the plea. Mr. Beito may challenge the unconstitutional judgment imposed by the trial court, without being forced to withdraw his plea. Mr. Beito's stipulation to real facts does not alter this result, as Mr. Beito did *not* stipulate to the either an exceptional sentence or to the aggaravating factors ultimately reiled upon by the court. A straightforward application of Blakely and Hughes compel the conclusion that the exceptional sentence Mr. Beito's rights to a jury trial and proof beyond a reasonable doubt. Blakely, 125 S.Ct. at 2536-38; Hughes, 154 Wn.2d at 136. The decision of the Court of Appeals in Hagar, relied upon to in the order denying Mr. Beito's PRP, is contrary to the straightforward rulings of this Court and the United States Supreme Court. The reasoning of Hagar and by extension the reasoning of the order in this case is both and obvious and probable error which substantially. Thus, this court should accept review under RAP 13.5.

b. *Hagar* has no application to this case. Aside from the erroneous reasoning which underlies Hagar, that case as no

application to the scenario presented here. Hagar concluded that the defendant's remedy in that case was to withdraw his guilty plea because, the court concluded, to allow him receive a standard range sentence would essentially frustrate the party's intent in entering the plea agreement in the first place. 126 Wn.App. at 325.

The order here provides:

> Beito challenges only the [real facts] stipulation, not the validity of the plea agreement . . . because such a stipulation is an integral part of the plea agreement "the stipulation and resulting sentence cannot be challenged apart from the agreement itself."

Order at 2 (citing Hagar). This, fundamentally misstates MR. Beito's argument.

In fact Mr. Beito has never, in any way challenged the validity of the real facts agreement in this case, he merely contends it does not permit the court to deprive him of constitutional rights by imposing a judgment for an aggravated offense. Neither the real facts agreement nor any other part of the plea agreement was an agreement to the imposition of an exceptional sentence. Because of that there is nothing which required the Court of Appeals to invalidate or excise the real facts agreement from the plea agreement in order to grant Mr. Beito relief. Thus, whether the real

facts agreement is an integral and indivisible portion of the contract is wholly irrelevant to issue in this case.

A different result might be required had Mr. Beito not only agreed to permit the court to consider facts supporting an exceptional sentence but in fact agreed to the imposition of an exceptional sentence. If this were so, then the State might be able to claim Mr. Beito's challenge to the judgment imposed was an effort to skirt an integral component of the agreement. But that is not the case. The plea agreement specifically informed both parties that the court was not bound to follow either party's recommendation. The plea agreement specifically provided that Mr. Beito could request a lower sentence and appeal the imposition of an aggravated sentence. In fact Mr. Beito did so on three prior occasions, succeeding in have the sentence vacated twice. Yet on none of these prior occasions did the State assert the challenges to the judgment imposed was an attack on an integral component of the plea agreement requiring Mr. Beito's remedy be limited to withdrawing his plea Because an agreement to an aggravated sentence was not an integral component of the plea agreement, and in fact was not a negotiated component at all, Hagar provides no basis for denying Mr. Beito the relief he has requested.

In light of the facts of this case, the Court of Appeals's reliance on Hagar is both an obvious and probable error warranting review under RAP 13.5.

2. BECAUSE THE COURT OF APPEALS ERRONEOUSLY CONCLUDED THE IMPOSITION OF A JUDGMENT FOR A GREATER OFFENSE DOES NOT VIOLATE DOUBLE JEOPARDY, THIS COURT SHOULD GRANT REVIEW

Mr. Beito contends that any judicial finding which increases the crime of conviction to a greater degree violates not only the Sixth and Fourteenth Amendments, it also violates the Fifth Amendment's Double Jeopardy Clause. Specifically, he argues that the imposition of an exceptional sentence based upon a judicial determination of the existence of aggravating factors amounts to a judgment notwithstanding the verdict, a procedure which plainly violates Double Jeopardy protections. Standefer v. United States, 447 U.S. 10, 21-25, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980); see also, State v. Mullins-Costin, 152 Wn.2d 107, 116, 95 P.3d 321 (2004) ("The prosecution in a criminal case cannot obtain a directed verdict or judgment notwithstanding the verdict, no matter how clear the evidence of guilt."); State v. Goins, 151 Wn.2d 728, 735, 92 P.3d 181 (2004) (refusing to strike plainly inconsistent verdicts of

guilt based on "traditional approach of exercising restraint from interfering with jury verdicts.")

The Court of Appeals concluded no Double Jeopardy violation occurred because

> In Maestas, the court held that the imposition of an exceptional sentence based on aggravating factors "does not fall under any exceptions to the general rule that double jeopardy is not implicate in a noncapital case. In reaching this conclusion, the court rejected claims that aggravating factors constitute elements of a "greater offense" and that jeopardy attaches when the trial court accepts a guilty plea.

(Citations omitted) Order at 2-3. Maestas, however, as no precedential value whatever, in light of the fact that this court granted the petition for review and summarily reversed the Court of Appeals. The order in this case suggest s Maestas was reversed on other grounds, and thus suggests it retains some precedential value.

The holding of Maestas was that (1) the imposition of an exceptional sentence violated the Sixth Amendment, (2) the state was free to seek the entry of an exceptional sentence on remand so long as a jury was empaneled to consider the facts necessary to support it, and (3) the allowing this procedure did not violate double jeopardy protections. This Court subsequently decided Hughes,

which agreed with Maestas that the imposition of an exceptional sentence did violate the Sixth Amendment, but flatly rejected the conclusion that a jury could be empanelled on remand. In rejecting the second of the holdings of Maestas it was not necessary to for Hughes to reach the last. At best, this third holding of Maestas is dicta as it in no way supports or leads to the ultimate outcome of that case, in fact it is contrary to the ultimate resolution of the case.

But aside from the fact that this Court overturned Maestas, Maestas rests on the conclusion that aggravating factors are not elements of greater offenses. 124 Wn.App359-60. This conclusion is simply incorrect and is contrary to the decisions of the United States Supreme Court.

Beginning with Apprendi the Court has repeatedly stated that the term or title the state wishes to attach to a given fact is wholly irrelevant. The Court has said "[t]he relevant inquiry is one not of form, but of effect - - does the required finding expose the defendant to greater punishment than that authorized by the jury's guilty verdict?" Apprendi, 530 U.S. at 494. In simpler terms:

> The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that defendant receives – whether the statute calls them elements of

> the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt.

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) (Scalia concurring).

But the Court has gone further to explain that the facts at issue must be treated in every respect as elements of the offense. In Apprendi the court distinguished the term "element" from the term "sentencing factor" noting that the former refers to facts which increase the maximum penalty for an offense while the later refers to facts which set the penalty with the existing range. Apprendi, 530 U.S. at 494. The Court further explained this saying

> Apprendi and McMillan, mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are **the elements** of the crime for purposes of the constitutional analysis.

Harris v. United States. 536 U.S. 545, 557-58, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2003) (Emphasis added); See also, Ring, 536 U.S. at 609 (aggravating circumstances that make a defendant eligible for increased punishment "operates as the functional equivalent of an element of a greater offense"), Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003) (plurality decision)("we can think of no principled reason to distinguish, between what constitutes an offense for the purposes of the Sixth

Amendment's jury-trial guarantee and constitutes and 'offence' for purposes of the Fifth Amendment's Double Jeopardy Clause"). Thus it is plain that the facts used to impose an exceptional sentence in Mr. Beito's case are elements, and must be analyzed as such.

Any decision which rests on the conclusion that aggravating factors need not be treated as elements of a greater offense, is plainly incorrect. Further, by relying on a case which this Court has reversed and in reaching the conclusion that aggravating factors are not elements of an offense, the order denying Mr. Beito's PRP is both plain and obvious error warranting review under RAP 13.5.

3. BECAUSE THE CHIEF JUDGE LACKS THE AUTHORITY TO DISMISS A NONFRIVOLOUS PRP REVIEW IS WARRANTED IN THIS CASE

RAP 16.11(b) provides:

> The Chief Judge determines at the initial consideration of the petition the steps necessary to properly decide on the merits the issues raised by the petition. If the issues presented are frivolous, the Chief Judge will dismiss the petition. If the petition is not frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits. If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing. The Chief Judge may enter other

> orders necessary to obtain a prompt determination of the petition on the merits.

As the rule provides, the Chief Judge has three options following review, (1) dismiss the petition, (2) transfer the petition to the Superior Court, or (3) refer to a panel of judges for a decision on the merits.

The rules of statutory construction apply to court rules. State v. Hutchinson, 111 Wn.2d 872, 877, 766 P.2d 447 (1989). Where the language of a statute or rule is plain and unambiguous, it is not subject to interpretation. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (citing Cherry v. Municipality of Metro. Seattle, 116 Wn.2d 794, 799, 808 P.2d 746 (1991)). A primary rule of statutory construction is that each statutory term was included to affect some material purpose. Vita Food Prods., Inc. v. State, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). Moreover, the rule of *expression unius est exclusio alterius* - specific inclusions exclude implications – requires the finding that specific statutory lists must be construed as intending to exclude those not listed. See State v. Sommerville, 111 Wn.2d 524, 535, 760 P.2d 932 (1988).

The unambiguous language of RAP 16.11 does not permit the Chief Judge to decide a petition on the merits, reserving that, in

a specific list, for a panel of judges once the chief judge determines the petition is not frivolous. The authority of the chief judge to "enter other orders necessary to obtain a prompt determination of the petition on the merits" cannot be read to allow the chief judge to dismiss a PRP on the merits. To do so would render the specific list wholly superfluous, as the chief judge could do whatever he or she elects. Moreover, the plain language of the rule indicates that the ability to enter "other orders" is limited to orders which facilitate consideration of the petition under the three alternatives provided.

In this case, the chief judge did not determine the peitition was frivolous. Nor could such a ruling have been made in light of the fact that this court had already accepted review in Hagar, had reversed Maestas, and has subsequently granted review in Jones. Having found the petition was not frivolous, the chief judge was left with two options (1) refer the matter to a panel of the court, or transfer the matter to the superior court for a reference hearing. The chief judge did not file either option. As such the order constitutes both plain and obvious error and warrants review under RAP 13.5.

4. THE COURT OF APPEALS FAILED TO APPOINT COUNSEL AS REQUIRED BY STATUTE

RCW 10.73.150 provides in relevant part

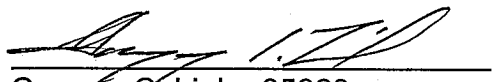
> Counsel shall be provided at state expense to an adult offender convicted of a crime and to a juvenile offender convicted of an offense when the offender is indigent or indigent and able to contribute as those terms are defined in RCW 10.101.010 and the offender:
> . . .
> (4) Is not under a sentence of death and requests counsel to prosecute a collateral attack after the chief judge has determined that the issues raised by the petition are not frivolous, in accordance with the procedure contained in rules of appellate procedure 16.11. Counsel shall not be provided at public expense to file or prosecute a second or subsequent collateral attack on the same judgment and sentence
> . . . .

Mr. Beito filed a motion for appointment of counsel. As set forth above, the chief judge did not an could have concluded the petition was frivolous. Therefore, RCW 10.73.150 required the court to grant the motion to appoint counsel. The court did not do so. The failure to comply with a plain statutory mandate is both probable and obvious error warranting review under RAP 13.5.

E. CONCLUSION

For the reasons set forth above and in his prior briefing, Mr. Boysen's urges this Court to grant review and grant his PRP.

Respectfully submitted this 10th day of October 2005.



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October 19, 2005

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CASE #: 56056-5-I
Personal Restraint Petition for Corey Beito Jr.

Counsel:

Enclosed please find a copy of the Order Dismissing Personal Restraint Petition entered by this court in the above case today.

Pursuant to RAP 16.14(c), "the decision is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in Rule 13.5(a), (b) and (c)."

This court's file in the above matter has been closed

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

BTE

enclosure

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

In the Matter of the Personal Restraint of:	)	No. 56056-5-I
COREY BEITO, JR.,	)	ORDER DISMISSING PERSONAL RESTRAINT PETITION
Petitioner.	)	

Petitioner Corey Beito, Jr., challenges the exceptional sentence imposed after he pleaded guilty to one count of first degree murder. Relying primarily on Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), he contends the exceptional sentence violated his rights under the Fifth, Sixth, and Fourteenth Amendments and under the Washington Constitution. But in order to obtain collateral relief by means of a personal restraint petition, a petitioner must demonstrate either an error of constitutional magnitude that gives rise to actual prejudice or a nonconstitutional error that inherently results in a "complete miscarriage of justice." In re Personal Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Because Beito has failed to make any showing that he can satisfy this threshold burden, the petition is dismissed.

Beito pleaded guilty to the premeditated murder of a 14-year-old girl. Prior to sentencing, he stipulated to facts establishing third degree rape of a child. Based on Beito's stipulation, the sentencing court imposed a 504-month exceptional sentence. Following a series of appeals, this court affirmed the sentence. State v. Beito, unp. decision noted at 119 Wn. App. 1056 (2003), review denied, 152 Wn.2d 1003 (2004).

Beito first contends that his exceptional sentence is invalid under Blakely and Apprendi because the factual basis was determined by the judge rather than a jury. He argues that his pre-Blakely stipulation was not a knowing and voluntary waiver of his Blakely rights and that he is therefore entitled to be resentenced within the standard range.

But Beito challenges only the stipulation, not the validity of the plea agreement. This court recently held that because such a stipulation is an integral part of the plea agreement, "the stipulation and resulting sentence cannot be challenged apart from the agreement itself." State v. Hagar, 126 Wn. App. 320, 325, 105 P.3d 65, review granted, 2005 Wash. LEXIS 710 (2005). Consequently, under Hagar, Beito's challenges fail.

Beito next contends that the imposition of an exceptional sentence violated the constitutional prohibition against double jeopardy. He reasons that the aggravating factors supporting an exceptional sentence constitute the elements of a "greater offense" and that once he pleaded guilty to the charged offense, double jeopardy principles precluded the State from "convicting" him of the "greater offense." These contentions are controlled by this court's decision in State v. Maestas, 124 Wn. App. 352, 101 P.3d 426 (2004), review granted in part and remanded on other grounds, 154 Wn.2d 1033, 2005 Wash. LEXIS 704 (2005). In Maestas, the court held that the imposition of an exceptional sentence based on aggravating factors "does not fall under any of the exceptions to the general rule that double jeopardy is not implicated in a noncapital case." Maestas, 124 Wn. App. at 360. In reaching this conclusion, the court rejected claims that aggravating factors constitute elements of a "greater offense" and

that jeopardy necessarily attaches when the trial court accepts a guilty plea. Maestas, 124 Wn. App. at 359-60.

Finally, Beito has filed motions for a stay pending the resolution of the appeals in State v. Hall, No. 52447-0, and State v. Robinson, No. 52447-0, and pending the Supreme Court's decision in State v. Hagar, No. 77138-3. The motions are denied.

Now, therefore, it is hereby

ORDERED that the motions for a stay are denied, and, it is further

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 19th day of October, 2005.

Appelwick, ACJ

Acting Chief Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

IN RE PERSONAL RESTRAINT PETITION OF	)	
	)	COA NO. 56056-5-I
COREY BEITO,	)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 10TH DAY NOVEMBER, 2005, A COPY OF *PETITIONER'S MOTION FOR DISCRETIONARY REVIEW* WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

[X] KING COUNTY PROSECUTING ATTORNEY
APPELLATE DIVISION
W554 KING COUNTY COURTHOUSE
516 THIRD AVENUE
SEATTLE, WA 98104

[X] COREY BEITO

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF NOVEMBER, 2005

X Ann Joyce